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No. 84-210

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

W. P. MCDONALD,
Petitioner,

v.

BRANIFF AIRWAYS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the courts below erred in approving the construction given to Section 4044(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA") by the agency charged with administering that statutory provision, the Pension Benefit Guaranty Corporation ("PBGC").

2. Whether the courts below erred in approving PBGC's interpretation of its own regulation which construes Section 4044(a)(3) of ERISA.

PARTIES TO THE PROCEEDING

Respondent PBGC is an agency of the United States government which was created by 29 U.S.C. § 1302(a). The other respondents are Braniff Airways, Inc. ("Braniff"), the Air Line Pilots Association International ("ALPA"), the Braniff Airways, Inc. Retirement Plan for Pilots, Part A (the "Pilots' Plan"), and Dale States, Jack Boisen, John Skiba, and Richard Russell, the members of the Retirement Board of the Pilots' Plan. Petitioner is the representative of the subclass of participants and their beneficiaries who currently receive retirement benefits under the Pilots' Plan. Other appellees in the court of appeals were N.G. Robson and V.A. Quattlebaum, the representatives of the subclass of participants of the Pilots' Plan who are not yet receiving retirement benefits.

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BRIEF OF RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (PBGC App. 1a)[1] is reported at 729 F.2d 315. The opinion of the district court affirming the bankruptcy court's order is reported at 37 Bankr. 922 (Pet. App. 19a-23a). The opinion of the bankruptcy court (Pet. App. 31a-35a) is reported at 27 Bankr. 220.

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[1] Hereinafter, "PBGC App." refers to the Appendix to this Brief in Opposition, "Pet." refers to the Petition for a Writ of Certiorari, and "Pet. App." refers to the Appendix to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant portions of section 4044(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1344(a), and 29 C.F.R. § 2618.13 are set forth in the Petition (Pet. App. 25a-30a).

STATEMENT

1. ***The Statutory and Regulatory Framework.***

To determine the benefits which will be paid upon the termination of a pension plan, ERISA sets forth a complex mechanism for allocating plan assets to retirees and active plan participants. *See* 29 U.S.C. § 1344(a) (1982). The statute establishes six benefit categories into which plan assets must be distributed. This case concerns the third priority category, under which plan assets are allocated to benefits payable at least three years before plan termination to retirees and their beneficiaries, and to participants eligible to retire. *See* 29 U.S.C. § 1344(a)(3). The priority category three benefits are the lowest benefits payable to those in this category, pursuant to the plan provisions that were in effect during the five-year period ending on the termination date of the plan. *Id.*

PBGC issued an interpretive regulation concerning this third statutory priority benefit category in January 1981. The regulation specifies, *inter alia*, that plan provisions "for automatic increases in the benefit formula" are taken into account if they were adopted and effective five years before the plan terminated, but only if the increases were for "both active participants [*i.e.*, those who

have not yet retired] and those in pay status [*i.e.*, retirees already receiving benefits] or for participants in pay status only . . . ." 29 C.F.R. § 2618.13(b)(5), Pet. App. 30a. Neither the statute nor the regulation recognizes any distinction among retirees based upon the date of their retirement.

2. ***The Disputed Benefit Provisions.***

On November 3, 1976, Braniff and ALPA signed a collective bargaining agreement that provided for subsequent step increases in the level of benefits to be paid to a select group under the Pilots' Plan. These benefit increases were limited to pilots who retired on or after August 1, 1976. For pilots who had retired before August 1, 1976 (and therefore were "in pay status" under the statute and regulation), there was no change from the existing minimum annual benefit of $14,400 for twenty years of service, plus an additional $250 for each year of service over twenty (the "$14,400 formula"). Pilots retiring after this date, however, were entitled to receive pension increases by steps in 1978 and 1979, starting with the $14,400 formula and increasing to a minimum annual benefit of $16,400 for twenty years of service, plus an additional $250 for each year of service over twenty (the "$16,400 formula") and 40% of their earnings during the best twelve consecutive months of the last 60 months of service prior to retirement (the "40% formula").

3. ***Proceedings in the Courts Below.***

Braniff filed a petition for relief under Chapter 11 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 1101-1174, on May 13, 1982. Thereafter, Braniff, ALPA, the Pilots' Plan and the Retirement Board of the Pilots' Plan commenced an adversary proceeding in the bankruptcy court to resolve several issues relating to the termination of the Pilots' Plan, including the method of calculating the priority category three benefits. PBGC took the posi-

tion that the $14,400 formula should apply in calculating category three benefits because it was the only benefit formula that satisfied the requirements of the applicable statute and regulation.

The bankruptcy court upheld PBGC's interpretation of 29 U.S.C. § 1344(a)(3) and 29 C.F.R. § 2618.13, ruling that the $14,400 formula was the proper formula for calculating the priority category three benefits.[2] *See* Pet. App. 1a-2a, 31a-35a.

Reviewing this matter *de novo*, the district court affirmed the bankruptcy court's order requiring calculation of priority category three benefits by the $14,400 formula. Pet. App. 19a-23a. In a *per curiam* opinion, the court of appeals summarily affirmed. *See* PBGC App. 1a-2a, *infra*.

ARGUMENT

Three courts, without any dissent, have sustained PBGC's position, and the issue is one that petitioner acknowledges is unlikely ever to recur. The petition fails to show "special and important" reasons for the grant of certiorari. *See* Sup. Ct. R. 17.1. Nevertheless, petitioner contends that this Court should act because the courts below were "palpably wrong" in affirming PBGC's interpretation of the statute and its regulation. *See* Pet. 4. This contention is unsupportable.

1. The statutory language limits priority category three to "the least" benefits "based on the provisions of the plan (as in effect during the 5-year period ending on [the termination date of the plan])." 29 U.S.C. § 1344(a)(3), Pet. App. 25a-26a. Consistent with this statutory language, PBGC's interpretive regulation gives category three treatment to benefits that were in a plan provision for automatic increases only if such provision

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[2] The bankruptcy court also held that the Pilots' Plan had terminated on August 30, 1982. Pet. App. 8a.

is "for both active participants and those in pay status or for participants in pay status only." 29 C.F.R. § 2618.13(b)(5). The preamble explains that such benefit increases for active participants must not exceed those for retirees "because, by definition, the lowest benefit provided by the plan during the 5-year period can be no greater than one based on the benefit formula applicable to participants in pay status." Preamble to Final Regulation, 46 Fed. Reg. 9480, 9484 (1981).

As petitioner concedes, the increases to the $16,400 and 40% formula were applicable only to *some* retirees. Pet. 6. Therefore, the PBGC correctly selected the $14,400 formula which was the lowest benefit level applicable to participants in pay status during the five-year period ending on the termination date.

This Court has ruled that an agency's construction of a statute that it administers is entitled to great deference. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The courts below correctly sustained the application of the PBGC regulation to the governing statute.

2. Petitioner argues that PBGC's regulation can only be read to grant category three treatment to automatic benefit increases that do not apply to all in pay status. Pet. 6-7. The district court held, however, that the PBGC's reading of its regulation requiring application to *all* retirees "is supported . . . by the common understanding of the words 'those in pay status' to include the *entire* class of retirees." Pet. App. 23a (emphasis added). The district court also based its holding on the agency's interpretation of its own regulation, which should control unless it is plainly erroneous or arbit[illegible]v. *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-1531

In the Matter of

BRANIFF AIRWAYS, INC., *et al.*,
Debtors.

W.P. MCDONALD,
Plaintiff-Appellant,

v.

BRANIFF AIRWAYS, INC., *et al.*,
Defendants-Appellees.

April 6, 1984

Hicks, Gillespie & James, James L. Hicks, Jr., Dallas, Tex., for plaintiff-appellant.

Arnold & Porter, K. Peter Schmidt, Washington, D.C., for Braniff Airways, Inc.

Mitchell L. Strickler, Lawrence F. Landgraff, Kent Cprek, Washington, D.C., for Pension Benefit Guaranty Corp.

McDonald, Sanders, Ginsburg, Phillips, Maddox, Newkirk & Day, Rick G. Sorenson, Kevin D. Kuenzli, Fort Worth, Tex., for defendants-appellees Robson and Quattlebaum.

Cohen, Weiss and Simon, Robert S. Savelson, New York City, for Air Line Pilots Assoc.

Appeal from the United States District Court for the Northern District of Texas; Eldon B. Mahon, Judge.

Before CLARK, Chief Judge, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

The judgment appealed from is affirmed based upon the memorandum opinion and order of the United States District Court for the Northern District of Texas, filed June 28, 1983, 37 B.R. 922 (N.D. Tex. 1984).

AFFIRMED.